In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 267

CLAYTON B. HELLNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims in *Dye* v. *United States,* Ct. Cl. No. 228–61 (Pet. 31), is not yet reported. The other nine related cases were decided without opinion.

JURISDICTION

The judgments of the Court of Claims were issued in *Hellner* and *Ramirez,* November 15, 1963; *Robbins,* November 22, 1963; *Swartz,* November 27, 1963; *Walsh,* January 3, 1964; *Bagnell* and *Davis,* January 24, 1964; *Herzog,* February 28, 1964; *Tutton,* May 1, 1964; and *Dye,* June 12, 1964. Motions for rehearing

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were denied in *Swartz*, January 24 and April 17, 1964;[1] *Hellner*, February 14, 1964; *Robbins*, March 13, 1964; *Davis*, *Walsh*, and *Bagnell*, April 17, 1964; *Ramirez* and *Herzog*, May 15, 1964. On April 22, 1964, the Chief Justice granted an extension of time for filing of petitions to and including July 13, 1964, in *Hellner* and *Robbins*. The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Whether the Court of Claims correctly ruled that petitioners' claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suits were filed either more than six years after the requests for the convening of Army retiring boards were refused or more than six years from the adverse decisions of retiring boards which were convened.

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[1] Insofar as it relates to *Swartz*, the petition is untimely. The petition in *Swartz* was filed more than 90 days after denial of the first motion for rehearing. Consequently, the petition was timely only if the second motion for rehearing was itself timely filed. See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498. The second motion for reconsideration was filed under Rules 68 and 69 (formerly Rules 53 and 54) of the Rules of the Court of Claims. Rule 68 permits the filing of such motions only within 30 days of the entry of judgment. Rule 69, which allows motions to set aside a judgment for mistake, excusable neglect, newly discovered evidence, and the like, specifically does not affect the finality of the judgment. While the petition is timely insofar as it seeks review of the denial of the motion, so considered the only issues properly before the Court are those relating to the propriety of the motion not the correctness of the original judgment which petitioner Swartz is in fact challenging.

STATUTE INVOLVED

Section 2501 of Title 28 of the United States Code provides in pertinent part:

> Time for filing suit.
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners, former officers in the United States Army, seek review of decisions of the Court of Claims dismissing their suits to recover military disability retirement pay on the ground that the action was barred by the six-year limitation period established for that court by 28 U.S.C. 2501.

The *Dye* case is illustrative of the facts in the ten cases. Petitioner Dye requested in May 1947 that he be allowed to appear before an Army retiring board; this request was denied in June 1947, on the ground that the record revealed no incapacitating physical defect.[2] In March 1960, almost thirteen years after he had been refused a retiring board, Dye filed an application with the Army Board for Correction of Military Records, which, in May 1961, after a hearing,[3] concluded, as had the retiring board, that Dye was not permanently incapacitated for active service at

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[2] In some of the cases, the retiring board heard but denied the claim.

[3] In some of the other cases, the Board of Correction denied an application for correction of the record without granting a hearing, ruling that insufficient evidence had been presented to indicate probable error by the retiring board.

the time of his release. In June 1961, he filed a petition in the Court of Claims, which was held to be barred by the six-year statute of limitations (Pet. App. 33–34).

ARGUMENT

In holding the present suits barred by the six-year limitation prescribed by 28 U.S.C. 2501 the court below correctly applied settled principles of law to the circumstances of each case. The rulings do not conflict with decisions of this or any other court. Accordingly, no question is presented meriting review by this Court.

1. Petitioners urge that decisions by retiring boards as a matter of law are not "final" because they are subject to review by disability review boards and the Board of Correction. The contentions raised by petitioners were given thorough consideration by the Court of Claims in 1962, and were rejected in *Friedman* v. *United States*, 310 F. 2d 381, certiorari denied, 373 U.S. 932. In that decision, the Court of Claims set forth clear standards for the application of its statute of limitations to military retirement cases, which standards it has followed consistently. *E.g.*, *Braun* v. *United States*, Ct. Cl. No. 68–62, decided October 11, 1963; *Merriott* v. *United States*, Ct. Cl. No. 374–61, decided November 15, 1963; *Robinson* v. *United States*, Ct. Cl. No. 433–59, decided November 15, 1963; *Grubin* v. *United States*, Ct. Cl. No. 167–60, decided June 12, 1964. In *Friedman*, the Court of Claims held (310 F. 2d at 395–396):

> *Summary:* As our discussion has shown, the main course of the court's decisions on the

time-bar in the disability retirement field reveals a well-structured design:

(a). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pay upon eligibility for disability retirement (or upon refusal of a request for such a board).

(b). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).

(c). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(d). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(e). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(f). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but

> accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

As the Court of Claims concluded, the action of the retiring boards, unless there is some indication by the board to the contrary, is final. Their actions were a definite determination as to disability, after which a petition could have been filed in the Court of Claims during the ensuing six years without going to the Board of Correction. But petitioners allowed the adverse action of the retiring boards to stand without challenge.

If a cause of action accrues upon the action or inaction of the retiring board, it follows *a fortiori* that the denial of relief by a disability review board or the Board of Correction would not start anew the running of the statute of limitations. The basic wrong which the claimant alleges lies in the decision of the retiring board and the later action merely constituted the failure of a board to rectify this wrong. A different result would allow any claimant to extend the period during which he could petition the Court of Claims simply by filing an application with the Board of Correction.

The principles laid down by the Court of Claims in *Friedman* are, contrary to petitioners' suggestion (Pet. 14–16), fully consistent with the long line of cases requiring exhaustion of administrative remedies before court relief may be obtained. Such cases hold only that court proceedings cannot be instituted until a "final"

administrative determination has been made.[4] Because review by a Board of Correction is discretionary rather than mandatory and because the decision by the retiring board, or the refusal to convene a retiring board, is not merely a recommendation to another tribunal, but a conclusive evaluation of the case, the Court of Claims has concluded that the action of the retiring board is the point in time at which the claimant's cause of action normally accrues.[5] The only court other than the Court of Claims which has had occasion to consider this question also concluded that no application to a Board of Correction is necessary in order

[4] The cases relied upon by petitioners clearly were ones in which no finality could be attributed to the last administrative decision prior to the bringing of the court action. For example, in *Anderson* v. *MacKenzie*, 306 F. 2d 248 (C.A. 9), plaintiff's discharge from the service was being held in abeyance pending a further administrative hearing when suit was brought one day before the administrative hearing was scheduled. *Burns* v. *McCrary*, 229 F. 2d 286 (C.A. 2), was a case in which plaintiff appealed an administrative ruling to the Secretary of the Army almost immediately upon the rendering of the ruling, and sought court relief while the appeal was pending. *Gusik* v. *Schilder*, 340 U.S. 128, and *Hunter* v. *Beets*, 180 F. 2d 101 (C.A. 10), deal with the prerequisites for the issuance of the extraordinary writ of habeas corpus, and consequently do not decide the question of the finality of any particular administrative remedy. *Reed* v. *Franke*, 297 F. 2d 17 (C.A. 4), holds only that a serviceman's discharge is not procedurally unconstitutional when a full hearing is provided after discharge.

[5] When there has been no evaluation by the retiring board of any kind, such as when no request for review is made to it, the cause of action accrues upon decision of the disability review board or the Board of Correction. *Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.).

for a cause of action to accrue. *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A. D.C.).*

2. Petitioners also contend that, even if the decisions of retiring boards are normally final, they were not so in these cases because (1) the boards themselves had indicated that their decisions were tentative; (2) a disability review board or the Board of Correction had reopened the case; or (3) the Board of Correction followed invalid procedures. Thus, assuming that the *Friedman* decision is correct, petitioners claim that they come within its terms since the facts show that the standards set forth in *Friedman* were misapplied here. However, the determination of such issues of fact as whether in the particular case the holding of the retiring board was not intended to be final or whether a disability review board or the Board of Correction had re-opened a case does not merit review by this Court.

As to whether the Board of Correction in some of these cases followed improper procedures, this is plainly not an issue for the Court of Claims even assuming that the Board's procedures are subject to judicial review in a federal court. Once, as in these cases, the statute of limitations has run on the underlying disability claim, the claimant no longer has an action within the jurisdiction of the Court of Claims; that court is restricted to the consideration of claims for compensation.

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* In addition, one other court of appeals has cited the *Friedman* case with approval. *Christian Beacon* v. *United States*, 322 F. 2d 312 (C.A. 3).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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